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Supreme Court of the United States

OCTOBER TERM, 1941

No. 579

DIONYSIA E. TSERIONI AND POLYTIME ANTONOPULO, DAUGHTERS OF GEORGE D. PAPAVASILOPULO, DECEASED, ET AL., *Petitioners,*

vs.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITIONERS' REPLY BRIEF

DAVID STECKLER,
Counsel for Petitioners.

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In the footnote on page 5 of the defendant's brief the statement is made that in *Barney* v. *Rickard*, 157 U. S. 332, this Court "expressly refrained from approving the language in Brune v. Marriott" (Pet. 9). We find nothing in the *Barney* case which can by any stretch of the imagination be construed as indicating an intention by this Court to refrain from approving the language of the Court in the *Brune* case that moneys paid as duties were paid as a deposit. It must be assumed that, in quoting the precise language of Taney, J., that "the payment of the money upon estimated duties is rather in the nature of a deposit or a pledge than a payment", this Court approved the ruling.

In the footnote on page 6 of the defendant's brief, the statement is made that Article 1082 of Customs Regulations (1908), referring to refunds of deposits, does not pertain to the refunding of ascertained duties found by the Board of General Appraisers to have been illegally exacted. Article 1082 refers to excess duties found due to the im-

porter "upon the liquidation" of the entry (Pet. Brief, p. 8). Under the statute there could not have been any liquidation of the entry after protest. Liquidation was suspended until after the determination of the Board of General Appraisers, and there was no liquidation until after such determination. Articles 1061, 1069, 1076 and 1084 of the 1908 Customs Regulations, referred to in the footnote, refer to refunds made upon *reliquidation* of customs entries which are made by the Secretary of the Treasury after transmittal to him by the collector of certified statements, and are not made from the collector's "Excess of Deposits Account".

The defendant asserts on page 7 of its brief that we have urged that a new cause of action arose upon the drawing of the checks in 1934 to the order of the importer We have not made such an assertion. What we did say was, and what we contend is, that the statute of limitation began to run from the date when demand for payment was made on the Comptroller General and refused by him.

The defendant argues that *United States* v. *Wardwell*, 172 U. S. 48, is not applicable here because the checks in that case were delivered to the claimant and subsequently lost by him, and that the funds against which they were checked were thereafter covered into the "outstanding liability" account of the Treasury. In their petition in the Court below the petitioners alleged that after the checks here involved were drawn by the collector they were transmitted to the Comptroller General "as an outstanding liability of the defendant" (Tr. Rec., p. 4, par. 12th). This allegation of fact was admitted by the demurrer. It also appears from the petition (Tr. Rec., p. 6, par. 18th) that the Comptroller General refused to pay the petitioners' claim for the reason that the refunds represented by the checks were directed to be used as an offset in partial liquidation of a claim for loss of revenue alleged to be due to

the defendant from petitioners' intestate, which direction and application were without legal right or justification in law or in fact. This allegation of fact was also admitted by the demurrer.

The contention is made by the Government that the drawing of the checks did not evidence an intention to deliver them, and that the petition did not allege that the amount thereof was "covered" into the "outstanding liability" account (Deft. Brief, p. 5). It is true that the precise words, "covered into the Treasury", were not used in the petition below, but it may fairly be inferred from its context that the moneys represented by the checks were covered into the Treasury. This appears from the admitted allegations that the checks were transmitted to the Comptroller General as an "outstanding liability" of the defendant (Rec. 4, par. Twelfth), and that the Comptroller General directed the application of the money "as an offset in partial liquidation of a claim for loss of revenue" (R. 5-6, par. Nineteenth). It is difficult to see how, if the money was not covered into the Treasury, the Comptroller General could direct application thereof to pay an alleged claim of the defendant. We submit that upon the argument of a demurrer and upon appeal from an order sustaining it, the pleader whose pleading is attacked is entitled to the benefit of every inference which may fairly be drawn from the pleading under attack.

Moreover, the Court below held that "neither the deceased, Eustadio D. Papavasilopulo, nor the plaintiffs, was ever indebted to the United States in any amount for any purpose, and the United States [fol. 16] was not entitled to use or apply these refunds on export duties as an offset in partial liquidation of any claim against Papavasilopulo or the plaintiffs" (R. 10). If there were such a claim that might well be the subject of an offset under a proper plea.

In the footnote on page 5 of defendant's brief, the Government cites certain tax cases which it is claimed are analogous to the case here. They have no pertinence whatever to the questions here involved. In *First Nat. of Greencastle* v. *United States,* 15 C. Cls. 225, 228-229, and *National Fire Ins. Co.* v. *United States,* 72 C. Cls. 663-669, the statute under which the claims were made expressly provided for the bringing of suit within two years next after the cause of action accrued. *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, 265; *Ohio Steel Foundry Co.* v. *United States,* 69 C. Cls. 158, 167; and *James* v. *United States,* 69 C. Cls. 215 at 220, have no relevance whatever. So, too, *Good* v. *Martin,* 95 U. S. 90, 96; *Young* v. *Clarendon Township,* 132 U. S. 340, 353; *Irving Trust Co.* v. *Leff,* 253 N. Y. 359, and *Daube* v. *United States,* 289 U. S. 367, 372, cited in defendant's brief (p. 8), have no relevance to the questions involved here.

Respectfully submitted,

DAVID STECKLER,
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